

1 STATE OF NEW YORK

2 SUPREME COURT : COUNTY OF SENECA

3 -----x

4 SHIRLEY F. SOBCZAK and BARRY PORSCH, )

5 Petitioner, )

-vs-

6 MICHAEL HAGADORN, JENNAFER HEFFERNAN  
7 MELODY REYNOLDS, SENECA COUNTY BOARD  
8 OF ELECTIONS,

Respondents.

9 -----x

10 SENECA COUNTY COURTHOUSE  
48 WEST WILLIAMS STREET  
11 WATERLOO, NEW YORK 13165-1396  
AUGUST 7, 2017

12 P r e s i d i n g:

13 HONORABLE WILLIAM K. TAYLOR  
14 Supreme Court Judge

15 A p p e a r a n c e s:

16 SANTIAGO BURGER, LLP  
ATTORNEY FOR THE PETITIONERS S. SOBCZAK & B. PORSCH  
1250 PITTSFORD VICTOR ROAD  
17 BLDG. 100, STE. 190  
PITTSFORD, N.Y. 14534  
18 BY: MICHAEL A. BURGER, ESQ.

19 PETER S. CORNING, ESQ.  
ATTORNEY FOR THE RESPONDENTS M. HAGADORN,  
20 J. HEFFERNAN & M. REYNOLDS  
1 SWIFT STREET  
21 AUBURN, N.Y. 13021

22 SENECA COUNTY ATTORNEY'S OFFICE  
FRANK R. FISHER, COUNTY ATTORNEY  
23 ATTORNEY FOR RESPONDENT SENECA COUNTY B.O.E.  
1 DIPRONIO DRIVE  
24 WATERLOO, N.Y. 13165

25 R e p o r t e d B y: CHRISTINE A. HAYES, CSR, RPR  
Official Court Reporter

(August 7, 2017; Waterloo, New York.)

THE COURT: This is the Matter of Shirley Sobczak and Barry Porsch versus Michael Hagadorn, Jennifer Heffernan, Melody Reynolds, and the Seneca County Board of Elections.

Good morning to each and every one of you. I want to apologize for being a little late, but I did want the opportunity to conference with the attorneys prior to the commencement of this proceeding, so I did take that opportunity *in Chambers*, and so I apologize for being late, but I do believe that that will expedite this proceeding.

Before the Court is a Petition for the Invalidation of an Opportunity to Ballot Petition under Election Law Article 16.

If we could have appearances of counsel, please? On behalf of the Petitioner Objector and Petitioner Aggrieved Candidate?

MR. BURGER: Good morning, your Honor. Michael Burger, Santiago Burger L.L.P. Would you like the address?

THE COURT: No, that's fine. Good morning to you.

MR. VANALLEN: Good morning, your Honor. Kevin

1 VanAllen on behalf of the Petitioners.

2 THE COURT: Very well. And good morning to you  
3 as well. Do you have your clients here as well?

4 MR. BURGER: Yes, your Honor. They're seated  
5 behind me. Ms. Sobczak. Mr. Porsch.

6 THE COURT: Very good. Good morning to both of  
7 you.

8 MR. PORSCH: Good morning.

9 THE COURT: As far as Mr. Hagadorn, Ms.  
10 Heffernan and Ms. Reynolds, who do we have?

11 MR. CORNING: Good morning, Judge. Peter E.  
12 Corning of Auburn, New York.

13 THE COURT: Very good. Good morning to you,  
14 sir.

15 MR. CORNING: Good morning, your Honor.

16 THE COURT: And do you have one of your clients  
17 there?

18 MR. CORNING: No. This is my assistant.

19 THE COURT: Very good. Good morning to you.  
20 And on behalf of the Board of Elections, who do we have?

21 MR. FISHER: County Attorney Frank Fisher  
22 present for the Board of Elections, your Honor.

23 THE COURT: Very good. Good morning to you.  
24 Mr. Burger and Mr. VanAllen, are you prepared to go  
25 forward with the proceeding at this time?

1 MR. BURGER: Yes, your Honor.

2 MR. VANALLEN: Yes, your Honor.

3 THE COURT: As far as the materials that you  
4 received via subpoena from the Board of Elections, did  
5 you find their production to be satisfactory?

6 MR. BURGER: Your Honor, everything we received  
7 is satisfactory, and there are Members of the Board of  
8 Elections here today to authenticate documents for the  
9 Court. I understand that just based on their policy they  
10 brought copies with them and they'll be able to tell the  
11 Court that they are true copies.

12 THE COURT: Very good. Very good. And  
13 counsel, Mr. Corning, you're here on behalf of the three  
14 Committee Members. Are you prepared to go forward this  
15 morning and have you spoken to your clients as to whether  
16 they take a position concerning this matter?

17 MR. CORNING: Yes, your Honor. I have  
18 conferenced with my clients and they have advised me to  
19 instruct the Court they are taking no position in  
20 connection with this matter.

21 THE COURT: Very good. Thank you, Counsel.  
22 And throughout this proceeding if that were to change or  
23 you were to desire to participate, I would certainly give  
24 you that opportunity.

25 As far as the Board of Elections is concerned,

1 Mr. Fisher, does the Board of Elections take a position  
2 concerning this matter?

3 MR. FISHER: No, your Honor. The Board of  
4 Elections has no interest in the outcome either way in  
5 this case.

6 THE COURT: Very good.

7 MR. FISHER: The only thing I would point out,  
8 as I pointed out in my papers, is that timing is the only  
9 issue for the Board of Elections.

10 THE COURT: And the Court is aware of that and,  
11 as discussed *in Chambers*, the Court will make every  
12 effort to issue its Decision before the end of the day  
13 today to accommodate all of the parties as well as to  
14 accommodate the reality of the work at the Board of  
15 Elections.

16 MR. FISHER: Thank you, your Honor.

17 THE COURT: Very good. Counsel, any other  
18 housekeeping matters before we get started? I know we  
19 are going to issue a Sequestration Order, is that  
20 correct?

21 MR. BURGER: Yes, Judge. It is correct.  
22 Anyone that is a non-party witness I would ask to please  
23 step out of the Courtroom, and I'd ask the Court to  
24 direct them to step out of the Courtroom.

25 THE COURT: Very good. So at this time the

1 Court will issue a Sequestration Order, and that will  
2 require anyone who has been subpoenaed as a witness  
3 concerning this matter, I'd ask you to step outside the  
4 Courtroom at this time until you are called to testify as  
5 a witness. I know we have, if you care to list them off,  
6 I have a feeling that those of you who are subpoenaed  
7 know who you are, so I'd just ask you to step outside at  
8 this time and you will be called as witnesses.

9 MR. CORNING: One other order of business, your  
10 Honor. My clients have submitted and I have in my  
11 possession an Answer to the Notice to Produce under the  
12 Subpoena Duces Tecum. I'll give them to Counsel. I'll  
13 file them with the Court.

14 THE COURT: Very good. Thank you.

15 MR. BURGER: They're unsigned, Judge. There's  
16 just sort of an "S" slash and then there's a Notary  
17 stamp.

18 THE COURT: Well, let's make this easy,  
19 Counsel. Do your clients have any documents,  
20 communications or information related to this proceeding?

21 MR. CORNING: They do not.

22 THE COURT: And the position that you have  
23 taken and submitted in Court Exhibits is that they had no  
24 knowledge of this before the Court proceeding, is that  
25 correct?

1 MR. CORNING: That's accurate.

2 THE COURT: Very good. So they do not have any  
3 documents or anything responsive to the subpoena, is that  
4 also correct?

5 MR. CORNING: They do not.

6 THE COURT: Counsel, is that satisfactory as  
7 far as the -- especially considering the position that  
8 Respondent Committee Members have taken -- is that  
9 satisfactory?

10 MR. BURGER: Judge, as long as that's based on  
11 Counsel's personal communications with Committee Members.

12 THE COURT: Mr. Corning, is that the case? Is  
13 that premised upon --

14 MR. CORNING: That's the case. I've spoken  
15 with them personally, your Honor.

16 THE COURT: Very good. Very good. Again, this  
17 is a Petition, a Verified Petition, that's been submitted  
18 to the Court for the Invalidation of an Opportunity to  
19 Ballot Petition under Article 16 of the Election Law  
20 brought by Ms. Shirley Sobczak and Barry Porsch  
21 concerning an Opportunity to Ballot Petition that was  
22 submitted concerning the Working Families Party.

23 Counsel, what is your burden as it pertains to  
24 the Petition before the Court? And just to clarify, my  
25 understanding is that the Petition itself, which I assume

1 will be submitted in evidence at some future point,  
2 contained eight signatures, is that correct?

3 MR. BURGER: It originally contained eight, but  
4 the Board of Elections --

5 THE COURT: Just let me --

6 MR. BURGER: Very good.

7 THE COURT: Did it contain eight?

8 MR. BURGER: Yes, it did, Judge.

9 THE COURT: And subsequent to the filing of  
10 your lawsuit I did receive a ruling from the Board of  
11 Elections on the objections that your clients submitted.  
12 And I believe that it struck one of the names premised  
13 upon an issue with that voter's address. Is that the  
14 case?

15 MR. BURGER: Yes, Judge. Objection Number 1 is  
16 stricken.

17 THE COURT: So as far as your paperwork  
18 concerning the objection submitted at this time, do you  
19 withdraw any objection as it pertains to that signature  
20 which was stricken by the Board of Elections by ruling in  
21 your favor concerning the objection?

22 MR. BURGER: To the extent that it's invalid I  
23 have no need to go further on that signature.

24 THE COURT: Very good. As far as the Petition  
25 that is before the Court today, that Petition contains



1           seven signatures, is that correct?

2                   MR. BURGER:    Yes, Judge, as a matter of law.

3                   THE COURT:    Just to clarify specifically, what  
4           are the specific signatures that you are objecting to,  
5           just to narrow the focus? Your papers it appears object  
6           to three signatures and then make an additional objection  
7           that the whole Petition is invalid because it is  
8           permeated with fraud, is that correct?

9                   MR. BURGER:    Yes, Judge. I don't know if we  
10          will proceed on a permeation, but there's more than three  
11          signatures as we learn more information since filing the  
12          Petition and I expect we'll adduce testimony as to one,  
13          two, three, four, five, six -- at least seven of the  
14          signatures.

15                  THE COURT:    Okay. And as far as the specific  
16          objection to signatures goes, as far as your paperwork is  
17          concerned, you specifically objected to three, is that  
18          correct?

19                  MR. BURGER:    Yes, but I did reserve at the time  
20          the right to supplement because of the pace of the case,  
21          and I still hadn't even gotten the determination at the  
22          time we filed.

23                  THE COURT:    Okay. But the three signatures  
24          that you challenged, just to focus again, was [REDACTED] --  
25          in your papers --

1 MR. BURGER: Yes, Judge.

2 THE COURT: -- Hooper --

3 MR. BURGER: [REDACTED] and [REDACTED].

4 Their wives are also signatories.

5 THE COURT: And the third was [REDACTED]?

6 MR. BURGER: Mr. [REDACTED], that is correct,  
7 Judge.

8 THE COURT: Very good. And as far as your  
9 burden today, what is your burden before the Court as far  
10 as the signatures and the permeation with fraud argument?

11 MR. BURGER: Judge, from the permeation of fraud  
12 I think that the law is clear, that's clear and  
13 convincing evidence. On the individual signatures, it's  
14 not as clear. The default, typically, as your Honor  
15 knows in civil cases, is a preponderance.

16 THE COURT: Okay. Very good. And before we  
17 get started I'll ask you, do you wish to make any opening  
18 remarks before we proceed with the presentation of proof  
19 in this proceeding?

20 MR. BURGER: No. Thank you, Judge.

21 THE COURT: Okay. Very good. There is a  
22 document, I believe that counsel had. Have we gotten  
23 that returned?

24 MR. CORNING: No. I was stealing it.

25 THE COURT: Okay. Very good. If we could have

1 that brought up to the bench? I would like to mark it.  
2 The return of this subpoena was returned to the Court and  
3 I would mark it as a Court's Exhibit. I'm not sure if  
4 Counsel at some point will be marking this as an Exhibit.  
5 But because it returned to Court, I did think it was  
6 important to submit the return of a Subpoena Duces Tecum  
7 that was issued for an individual named Joseph J. Sapio.  
8 Mr. Sapio did submit an Affidavit as it pertains to the  
9 response on this Subpoena Duces Tecum.

10 Mr. Sapio has not intervened in this proceeding  
11 in any way or provided any other documents to participate  
12 in this proceeding in any other way. So I did just want  
13 to note that for the record. And I'm going mark, unless  
14 there's an objection from any party, I'm going to mark  
15 simply as a Court's Exhibit the return of the Subpoena  
16 Duces Tecum that was returned by Mr. Sapio. And again  
17 note that he has appeared in no other way in this suit.

18 MR. SAPIO: Your Honor, if I may? Joseph  
19 Sapio. I am present. I was not listed as a party of  
20 this lawsuit. I was served only a Subpoena Duces Tecum,  
21 which I have complied with. I am present however though,  
22 Judge.

23 THE COURT: Okay. And are you -- okay. And  
24 you have not submitted any papers to submit as a Party of  
25 Interest or as an Aggrieved Candidate in any way or

1 indicated any legal intention to intervene in this  
2 proceeding up to this point, is that correct?

3 MR. SAPIO: Your Honor, whatever this Petition  
4 is, it will be. The only aggrievement is I believe the  
5 reckless language used by the Petitioners.

6 THE COURT: Well, that's not my question, sir.  
7 And this is not an opportunity to make arguments. My  
8 question is, have you participated by filing any legal  
9 paperwork concerning this matter? Yes or no?

10 MR. SAPIO: I have not, your Honor.

11 THE COURT: Thank you, sir. You may sit down.

12 MR. SAPIO: Thank you.

13 THE COURT: I will have this marked as Court's  
14 Exhibit 1 at this time to indicate the Court's receipt of  
15 that document.

16 That being said, Counsel, you've indicated that  
17 you don't wish to make any Opening Statements. You may  
18 call your first witness.

19 MR. BURGER: Thank you, Judge. I do. It I  
20 appears Mr. Sapio didn't get a subpoena for testimony. I  
21 would like to give him one and ask that he be sequestered  
22 as well. I've put it down for 10:30 just figuring that  
23 9:30 was a moot point. Mr. Sapio?

24 MR. SAPIO: I don't have any -- does he have a  
25 check for me as well for being in compliance with the

1 subpoena, Judge?

2 MR. BURGER: I can give you \$20, sir.

3 MR. SAPIO: I'll acknowledge receipt, your  
4 Honor.

5 THE COURT: The record should reflect that  
6 Mr. Burger has pulled \$20 from his billfold and handed it  
7 to Mr. Sapio. And, Mr. Sapio, thank you very much. I  
8 appreciate it.

9 MR. SAPIO: All right.

10 THE COURT: And Mr. Sapio will be complying  
11 with the Court's Sequestration Order and be stepping  
12 outside as a subpoenaed witness. I haven't seen that  
13 before, Mr. Burger. So, I will give you that is my  
14 first. Very good. With that being said, you may call  
15 your first witness.

16 MR. BURGER: Petitioners call Mr. [REDACTED]

17 [REDACTED]  
18 THE COURT: Very good. Well, we'll call  
19 Mr. Paradise.

20 CLERK OF THE COURT: Do you swear the testimony  
21 you are about to give today shall be the truth, the whole  
22 truth and nothing but the truth, so help you God?

23 THE WITNESS: I do.

24 CLERK OF THE COURT: Can you please state your  
25 name and spell it for the record?

Transcript pages of innocent voter testimony redacted.

1 not proper. Is that fair to say?

2 MR. BURGER: Correct, your Honor. Yes.

3 THE COURT: Very good. The Court's in recess.  
4 I'll issue a decision from the bench briefly.

5 (Recess taken at 11:06 a.m.)

6  
7 (Proceedings reconvened; appearances as before  
8 noted.)

9 THE COURT: This is a Recall of the Matter of  
10 Shirley Sobczak and Barry Porsch v. Michael Hagadorn, et  
11 al; filed under Index Number 17-51345.

12 The Court has had a chance to consider this  
13 Matter *in Chambers* and is prepared to render its Oral  
14 Decision from the Bench. The record should reflect that  
15 all of the parties that were previously in the Courtroom  
16 are present at this time. The Court issues its Decision  
17 as follows:

18 Before the Court is Petitioner Objector Shirley  
19 Sobczak and Petitioner Aggrieved Candidate Barry Porsch's  
20 Verified Petition by Order to Show Cause under Election  
21 Law Article 16 seeking an Order Invalidating an  
22 Opportunity to Ballot Petition for the Office of the  
23 Seneca County District Attorney in the upcoming September  
24 12th, 2017 Working Families Party Primary.

25 Respondents in this Matter are Michael Hagadorn,

1 Jennifer Heffernan, and Melody Reynolds, the named  
2 Committee Members to receive Notices on the Petition at  
3 issue. These Respondent Committee Members are  
4 represented by Attorney Peter Corning, who has appeared  
5 in this Matter and has taken no position on behalf of his  
6 clients and has indicated that his clients were not aware  
7 that their names had been placed on the Petition. The  
8 Respondent, Seneca County Board of Elections, represented  
9 by Seneca County Attorney Frank Fisher, has appeared in  
10 this matter, but takes no position. No other parties  
11 have moved to intervene or appear in this matter.

12 On or about July 27th of 2017, a Purported  
13 Opportunity to Ballot Petition containing eight  
14 signatures was filed with the Respondent Board of  
15 Elections seeking to Allow an Undesignated Candidate or  
16 Candidates to be Written in and Nominated for Election to  
17 the Office of Seneca County District Attorney on the  
18 Ballot of the Working Families Party Line in that party's  
19 Primary Election, to be held on September 12th of 2017.

20 Under Election Law §6-154, Petitioner Objector  
21 timely filed with the Seneca County Board of Elections  
22 written objections to several of the signatures contained  
23 in the Petition. The Board of Elections ruled that the  
24 objection challenging the signature of [REDACTED]  
25 [REDACTED] regarding a defective address was a valid



1 objection and ruled that signature was invalid, thus  
2 seven signatures were left in the Petition. And the  
3 Commissioner specifically did not reach the fraud issue  
4 set forth in the objection as they are beyond the  
5 ministerial scope of the Board of Elections.

6 Commissioner Ruth Same of the Seneca County  
7 Board of Elections testified here in Court that an  
8 Opportunity to Ballot Petition for the Office of Seneca  
9 County District Attorney in the Working Families Primary  
10 requires six valid signatures to be a valid Petition.  
11 This number was reached via a formula that is set forth  
12 in Election Law §6-136.

13 Under Election Law §6-132(3) and §6-166, a  
14 Notary Public who witnesses a signature on an Opportunity  
15 to Ballot Petition must Administer an Oath and have the  
16 witness attest to the truthfulness of such witness's  
17 statement. Such attestation by a Notary Public is  
18 generally entitled to a presumption of regularity. See  
19 *Bonner v. Negron*, 87 AD 3d 737, 738 [2d Dept. 2011].

20 However, this presumption may be rebutted by  
21 credible testimony that the voter was not placed under  
22 oath or made to attest to the truth of his or her  
23 statement. See *Leahy v. O'Rourke*, 307 AD 2d 1008, 1009,  
24 [2d Dept. 2003].

25 ("Unrefuted testimony ... that Notary Public ...

1 did not administer an oath or affirmation to the  
2 witnesses in any manner required by law," invalidates  
3 such signatures.)

4 Here, the Petition at issue admitted into  
5 evidence contained eight signatures that were purportedly  
6 witnessed by a Notary Public. The Court heard the  
7 testimony of the following seven signatories to the  
8 Petition at issue: [REDACTED], [REDACTED],  
9 [REDACTED], [REDACTED], [REDACTED], [REDACTED],  
10 [REDACTED] and [REDACTED]. The Court finds that these  
11 witnesses have provided credible testimony before this  
12 Court that they were not sworn, no oath was provided, nor  
13 were the witnesses required by the Notary Public to  
14 attest to the truth of their alleged statements.

15 Therefore, Petitioners have met their burden of  
16 proof by a preponderance of the evidence; and, in fact,  
17 if it were the standard by clear and convincing evidence,  
18 that six of the eight signatures are invalid as not sworn  
19 to as required by New York State Law. As noted  
20 previously, [REDACTED] signature was ruled invalid  
21 by the Board of Elections because of a defective address,  
22 and that determination stands.

23 Accordingly, it would appear that there remains  
24 only one valid signature left on the Petition; and, in  
25 the alternative, even if this Court is limited in its

1 review to those signatures specifically challenged on  
2 this ground in this specific objection, which would be  
3 [REDACTED] and [REDACTED], the Petition would still  
4 fall short of the legal requirements, as there would only  
5 be five valid signatures remaining on the Petition; and,  
6 as stated earlier, six signatures are required for the  
7 Petition to be valid. Further, allegations of fraud in  
8 this matter are rendered academic, based on the Court's  
9 determination as to the signatures. Accordingly, this  
10 Court Orders as follows:

11 It is hereby adjudged and declared as invalid  
12 the Opportunity to Ballot Petition of the Working  
13 Families Party purporting to Allow an Undesignated  
14 Candidate or Candidates to be Written in and Nominated  
15 for Election to the Office of Seneca County District  
16 Attorney on the Ballot in the Primary Election to be held  
17 on September 12th, 2017, and any determination of  
18 Respondent Board of Elections to the extent that it is  
19 contrary to this Decision is hereby reversed.

20 Respondent Board of Elections is further  
21 directed not to permit the Write-in or Nomination of an  
22 Undesignated Candidate or Candidates to be Written in and  
23 Nominated for Election to the Office of Seneca County  
24 District Attorney on the Ballot in the Primary Election  
25 to be held on September 12th of 2017.

1 In short, Petitioner's Request for Relief is  
2 granted in its entirety. Petitioner is directed to  
3 provide a Proposed Court Order for the Court's signature  
4 by the end of business today, reflecting the same, with a  
5 transcript of this Decision, which can be attached, as  
6 soon as it is practicable; which, taken together, shall  
7 constitute the Decision, Declaration and Order of this  
8 Court.

9 That does conclude this matter. Thank you.

10 MR. BURGER: Thank you, your Honor.

11 (Proceedings concluded at 12:17 p.m.)  
12

13 (Certified to be a true and accurate transcript.)

14 Christine O. Sawyer CSR RPR  
15 OFFICIAL COURT REPORTER  
16 SEVENTH JUDICIAL DISTRICT  
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